Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matters of	)	
	)	
Public Notice on Interpretation of the Terms	)	MB Docket No. 12-83
"Multichannel Video Programming Distributor"	)	
and "Channel" as Raised in Pending	)	
Program Access Complaint Proceeding	)	
	)	
Complaint of Sky Angel U.S., LLC	)	MB Docket No. 12-80
Against Discovery Communications, LLC, *et. al.*	)	
For Violation of the Commission's Competitive	)	
Access to Cable Programming Rules	)	

COMMENTS OF SKY ANGEL U.S., LLC

SKY ANGEL U.S., LLC

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EXECUTIVE SUMMARY

Sky Angel U.S., LLC ("Sky Angel") provides an affordable, nationwide, subscription-based service of approximately eighty linear channels of exclusively family-friendly video and audio programming, including many of the nation's most popular non-broadcast networks. Sky Angel utilizes satellite uplinks and downlinks, fiber it controls, and subscribers' broadband Internet connections to aggregate and distribute multiple channels of video programming. The IP-formatted, securely encrypted programming, for which Sky Angel's content partners are compensated on a per-subscriber basis, is transmitted to proprietary set-top boxes which decrypt the programming and deliver it directly to subscribers' television sets.

Subscribers cannot access Sky Angel's programming without a set-top box, and they choose particular programming channels via a channel guide displayed on their televisions. Thus, from a consumer's perspective, Sky Angel is functionally identical to "traditional" multichannel video programming distributors ("MVPDs"). Sky Angel's innovative service, and the competition it poses to established MVPDs, is exactly what Congress envisioned when it applied program access obligations to vertically-integrated programming providers.

In October 2007, Sky Angel and Discovery Communications, LLC and its affiliate, Animal Planet, L.L.C. (collectively, "Discovery") entered into an agreement allowing Sky Angel to distribute, via an "IP System," several of Discovery's linear programming networks. Although Discovery never expressed any dissatisfaction with respect to the agreement or Sky Angel's service, in December 2009, Discovery suddenly informed Sky Angel that it intended to unilaterally terminate the agreement, and thus withhold its programming from Sky Angel's existing and potential subscribers in violation of the program access rules. On March 24, 2010, after Discovery repeatedly refused to either retract its threat or provide a justification for it, Sky

Angel filed a program access complaint (the "Complaint") with the Media Bureau. At the same time, Sky Angel filed a petition requesting that the Bureau grant a temporary standstill to prevent Discovery's withholding pending the outcome of the program access proceeding.

On April 21, 2010, before Sky Angel timely responded to Discovery's claimed defenses, including that Sky Angel fails to qualify as an MVPD, the Bureau declined to issue a standstill, finding that Sky Angel had not satisfied the heavy burden imposed upon a party seeking injunctive relief. Significantly, in doing so, the Bureau noted the limited record before and the lack of FCC precedent, and emphasized that its decision not to issue a standstill "should not be read to state or imply that the Commission, or the Bureau acting on delegated authority, will ultimately conclude … that Sky Angel does not meet the definition of an MVPD." In other words, neither the Bureau nor the full Commission has ruled on any of the merits of Sky Angel's program access complaint, including whether Sky Angel qualifies as an MVPD.

In fact, the Commission took no further action with respect to the Complaint until after a federal court of appeals required it to respond to a Petition for Writ of Mandamus in which Sky Angel asked the court to compel action on the Complaint. Six days before the Commission's deadline to file that response, the Bureau released the Public Notice seeking comment on various issues, most of which are only tangentially related, if at all, to Sky Angel's service, and thus the scope of the program access dispute proceeding for which the Public Notice allegedly addresses.

As detailed below, Congress created a broad, open-ended MVPD definition to allow the FCC to fully effectuate the program access provisions' expansive goals – namely, to prevent vertically-integrated programmers from withholding their programming from, or otherwise discriminating against, existing and emerging competitors, and thereby restrain entrenched MVPDs' anti-competitive practices. The plain and proper meaning of the MVPD definition's

terms clearly encompass a service such as Sky Angel, which is functionally identical to a cable or satellite television service, particularly in the mind of a consumer. Further, the expressly non-exhaustive list of MVPD examples enumerated in the definition do not restrict the types of distributors that qualify as an MVPD, and certainly do not require that every MVPD use particular technologies to distribute programming. In fact, Congress emphasized its desire "to spur the development of communications technologies." Moreover, Commission precedent establishes that a distributor need not be "facilities-based" or directly provide all necessary transmission paths to qualify as an MVPD. In addition, law, regulation, legislative history, and Commission precedent inarguably demonstrate that Congress used the term "multiple channels" to mean "multiple linear programming networks."

A particularized finding that Sky Angel qualifies as an MVPD also will significantly advance the public interest, as Congress intended. Increased competition leads to greater investment in new technologies, services, and programming choices, which lead to increased consumer choice at lower prices. But competing distributors, particularly new entrants, cannot effectively compete if they are denied access to vertically-integrated programming, for which there are no close substitutes. Moreover, as the Department of Justice recently concluded, competition from distributors such as Sky Angel is vitally important because the start-up costs for entry into traditional video distribution often are insurmountable, and thus the only new competitors in most areas likely will be Internet-based offerings. Increased competition from this type of MVPD also will encourage broadband adoption, a key Commission objective.

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Public Notice on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding	)	MB Docket No. 12-83
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Complaint of Sky Angel U.S., LLC Against Discovery Communications, LLC, *et. al.* For Violation of the Commission's Competitive Access to Cable Programming Rules	)	MB Docket No. 12-80

COMMENTS OF SKY ANGEL U.S., LLC

Sky Angel U.S., LLC ("Sky Angel") hereby submits these comments in response to the Public Notice released by the Media Bureau (the "Bureau") on March 30, 2012 in the above-captioned proceeding.[1] The Public Notice arises out of a program access dispute proceeding initiated by Sky Angel against Discovery Communications, LLC and its affiliate, Animal Planet, L.L.C. (collectively, "Discovery"). As detailed below, Congress created a broad, open-ended definition of a multichannel video programming distributor ("MVPD") that clearly encompasses Sky Angel's innovative service. Accordingly, a particularized finding that Sky Angel qualifies as an MVPD entitled to the program access protections would advance Congress' pro-competition, pro-consumer goals in enacting the MVPD definition and the program access provisions as part of the Cable Television Consumer Protection and Competition Act of 1992.[2]

[1] *Media Bureau Seeks Comment on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding*, Public Notice, MB Docket No. 12-83, DA 12-209 (Mar. 30, 2012) ("Public Notice").

[2] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 (1992) ("Cable Act").

I. SKY ANGEL'S INNOVATIVE SERVICE

Sky Angel provides a nationwide, subscription-based service of approximately eighty linear channels of exclusively family-friendly video and audio programming, including many of the nation's most popular non-broadcast networks,[3] at affordable rates.[4] To create this service, which in part utilizes Internet protocol ("IP") technology and proprietary set-top boxes, Sky Angel invested more than $15 million in capital expenditures. This includes an antenna site located in Tennessee consisting of eighteen satellite earth stations that receive programming from Sky Angel's content partners, who are compensated on a per-subscriber basis. After Sky Angel receives content and makes any necessary quality adjustments, it encodes, bundles and securely encrypts the programming. It then transmits the programming via fiber it controls to "headends" in New York City and Palo Alto. From there, the encrypted IP-formatted programming is sent via broadband Internet connections directly to set-top boxes in subscribers' homes.

Subscribers cannot access Sky Angel's encrypted programming without the set-top box, which decrypts the signals and transmits them to subscribers' television sets.[5] Sky Angel has the ability at all times to interact directly with the set-top box from a remote location for purposes ranging from periodic service and software updates to service activation or termination. The set-

[3] *See* www.skyangel.com/Programming/ChannelsLineUp.

[4] The monthly subscriber fee for access to all of Sky Angel's video and audio channels is only $32.99.

[5] The programming distributed via Sky Angel's service remains extremely secure until decrypted by the proprietary set-top box (*i.e.*, after the programming has traveled over a broadband Internet connection). Sky Angel uses a back-end IP distribution technology provided by NeuLion. This same technology and company is used by numerous traditional and emerging MVPDs. *See CellularVision of New York, L.P. v. SportsChannel Associates*, Memorandum Opinion and Order, 10 FCC Rcd 9273, 9279 (1995) ("[O]ur conclusions with respect to the legitimacy of defendant's concerns about CellularVision's security system are buttressed by the fact that other satellite cable programming vendors have expressed their satisfaction with CellularVision's signal security system.").

top box has broadband Internet inputs[6] and video outputs that connect directly to a television set, and the set-top box employs industry-standard copy protection. A subscriber receives the decrypted signal from the set-top box on a television set, and accesses the programming channels via a channel guide and a typical handheld remote control. Therefore, to a consumer, Sky Angel is functionally identical to traditional satellite or cable video distribution services. Sky Angel's innovative service, and the competition it poses to well-entrenched cable systems, is exactly what Congress envisioned when it applied program access obligations to vertically-integrated programmers.

II. BACKGROUND

In October 2007, Sky Angel and Discovery entered into an Affiliation Agreement for the distribution of multiple linear channels of Discovery programming in exchange for per-subscriber payments to Discovery. The agreement, the term of which extends through December 31, 2014, expressly permits use of Sky Angel's precisely-defined "IP System" to distribute Discovery's programming networks. As late as September 2009, Discovery proposed that the parties expand their agreement, asking Sky Angel to carry, and pay for, additional Discovery-owned networks.

Then, in December 2009, Discovery unexpectedly informed Sky Angel that it planned to terminate the Affiliation Agreement, and thus withhold its programming from Sky Angel's existing and potential subscribers in violation of the Commission's program access rules.[7]

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[6] Sky Angel's set-top boxes are capable of connecting to a broadband Internet connection either through a cable or a subscriber's local Wi-Fi network. The reference in Sky Angel's program access complaint to "wireless," which the Bureau references, *see* Public Notice at ¶ 4, was intended to refer only to this Wi-Fi capability. In other words, Sky Angel's set-top boxes cannot connect directly to a wireless broadband network.

[7] *See News Corp. and The DIRECTV Group, Inc., Transferors, and Liberty Media Corp., Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265, 3302 (2008) ("*DIRECTV Transfer Order*") ("[W]e will require as a condition of our approval of the transaction that the program access conditions set forth herein with respect to Liberty Media shall apply also to Discovery…"); *id.* at 3300 ("[I]n the absence of any

Although Sky Angel repeatedly sought additional information from Discovery, and offered to cooperate fully to address Discovery's alleged "concerns," Discovery refused to provide any justification, reasonable or otherwise, for its threatened termination, or even explain its "concerns" so that Sky Angel could attempt to resolve any alleged issues in a mutually satisfactory manner. Instead, Discovery simply repeated that it was "uncomfortable" with Sky Angel's distribution methodology, which had not changed since the parties executed the Affiliation Agreement two years earlier. At no time during the two years prior to Discovery's unilateral rescission had Discovery expressed any dissatisfaction with respect to the Affiliation Agreement or Sky Angel's service.[8]

On March 24, 2010, after Discovery repeatedly refused to either retract its termination threat or provide a justification for it, Sky Angel filed a program access complaint.[9] At the same time, Sky Angel filed a petition requesting that the Bureau grant a temporary standstill to prevent Discovery's withholding pending the outcome of the program access proceeding.[10] On April 12, 2010, Discovery filed an opposition to Sky Angel's Standstill Petition in which it set forth arguments regarding the merits of Sky Angel's Complaint, including that Sky Angel fails to qualify as an MVPD entitled to the protections of the program access rules.[11] Then, on April 21,

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restrictions embodied in the rules or conditions, Discovery … would be able to withhold programming or price discriminate in favor of DIRECTV.").

[8] Sky Angel had timely paid all fees owed to Discovery under the agreement at the rates required by Discovery, and Discovery accepted all such fees.

[9] *See Sky Angel U.S., LLC v. Discovery Communications LLC, et al.*, Program Access Complaint, MB Docket No. 12-80, File No. CSR-8605-P (filed Mar. 24, 2010) (the "Complaint").

[10] *See Sky Angel U.S., LLC v. Discovery Communications LLC, et al.*, Emergency Petition for Temporary Standstill, MB Docket No. 12-80, File No. CSR-8605-P (filed Mar. 24, 2010) ("Standstill Petition").

[11] *See Sky Angel U.S., LLC v. Discovery Communications LLC, et al.*, Opposition to Emergency Petition for Temporary Standstill, MB Docket No. 12-80, File No. CSR-8605-P (filed Apr. 12, 2010) ("Standstill Opposition").

2010, Discovery filed an answer to Sky Angel's Complaint, in which Discovery reiterated and expanded upon many of the arguments it made in opposing the Standstill Petition.[12]

On April 21, 2010, the same day Discovery filed its Answer and more than two weeks *before* Sky Angel timely filed its Reply on May 6, 2010,[13] the Bureau adopted an order in response to Sky Angel's Standstill Petition.[14] In other words, the Bureau issued the *Standstill Order* before Sky Angel could respond to Discovery's claimed defenses, including that Sky Angel fails to qualify as an MVPD.[15] The Bureau was forced to hastily adopt the *Standstill Order* because Discovery was threatening to, and subsequently did, turn off Sky Angel's receivers, and thus withhold its programming, on April 22, 2010.

Although the Bureau declined to grant Sky Angel's request for a temporary standstill, it expressly did not rule on the merits of Sky Angel's Complaint, including whether Sky Angel qualifies as an MVPD. Instead, the Bureau simply concluded that, "based on the record before [it] at this stage in the complaint proceeding," Sky Angel had not satisfied the heavy burden imposed upon a party moving for injunctive relief.[16] As noted, the Bureau adopted the *Standstill Order* before Sky Angel timely filed its Reply, and therefore prior to a complete record in the

[12] *See Sky Angel U.S., LLC v. Discovery Communications LLC, et al.*, Answer to Program Access Complaint, MB Docket No. 12-80, File No. CSR-8605-P (filed Apr. 21, 2010) ("Answer").

[13] *See Sky Angel U.S., LLC v. Discovery Communications LLC, et al.*, Reply to Answer to Program Access Complaint, MB Docket No. 12-80, File No. CSR-8605-P (filed May 6, 2010) (the "Reply").

[14] *See Sky Angel U.S., LLC Emergency Petition for Temporary Standstill*, Order, 25 FCC Rcd 3879 (MB 2010) ("*Standstill Order*").

[15] Sky Angel had not detailed why it qualifies as an MVPD in its initial filings because the nature of its service makes clear that Sky Angel qualifies as an MVPD under the statutory and regulatory definitions of that term.

[16] *Standstill Order*, 25 FCC Rcd at 3881-82 (emphasis added) (citing *Amendment of Part 22 of the Commission's Rules*, Order, 8 FCC Rcd 5087, 5087 (1993) (movant must "convincingly demonstrate[]" necessity of a stay)); *see Tele-Visual Corp.*, Order, 34 FCC 2d 292, ¶ 2 (1972) ("A stay is extraordinary relief and the burden upon one who seeks such relief is a heavy one.").

proceeding.[17] The Bureau noted the limited record before it and emphasized that the *Standstill Order* had no bearing on the ultimate determination of the underlying Complaint:

> Our decision to deny Sky Angel's standstill petition should not be read to state or imply that the Commission, or the Bureau acting on delegated authority, will ultimately conclude, in resolving the underlying complaint, that Sky Angel does not meet the definition of an MVPD. Rather, based on the limited record before us at this stage and the lack of Commission precedent on that issue, we are unable to conclude that Sky Angel has met its burden of demonstrating that the extraordinary relief of a standstill order is warranted.[18]

Accordingly, neither the Bureau nor the full Commission has ruled on any of the merits of Sky Angel's program access complaint, including whether Sky Angel qualifies as an MVPD.

Because of the Commission's continued inaction on Sky Angel's Complaint for nearly two years, on February 27, 2012, Sky Angel filed a Petition for Writ of Mandamus in the United States Court of Appeals for the District of Columbia Circuit (the "Court").[19] In its Mandamus Petition, Sky Angel asked the Court to compel the Commission to adopt and release a final order on the merits of the program access complaint within thirty days of the Court's decision. On March 6, 2012, the Court ordered the Commission to file a response to the Mandamus Petition by April 5, 2012. On March 30, 2012, just six days before the Commission timely filed a response with the Court,[20] the Bureau released the Public Notice.[21] In its Mandamus Opposition, the Commission defended its unreasonable delay in acting on Sky Angel's Complaint in part on the release of the Public Notice, claiming that, "[i]n seeking comment, the Commission has made

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[17] *Standstill Order*, 25 FCC Rcd at 3883, n. 34 ("We note that the pleading cycle has not yet ended…").

[18] *Id.* at 3884 (emphasis added).

[19] *See In re Sky Angel U.S., LLC*, Petition for Writ of Mandamus, Case No. 12-1119 (filed Feb. 27, 2012) ("Mandamus Petition").

[20] *In re Sky Angel U.S., LLC*, Opposition of Federal Communications Commission to Sky Angel's Petition for Writ of Mandamus, Case No. 12-1119 (filed Apr. 5, 2012) ("Mandamus Opposition").

[21] Sky Angel notes that, prior to releasing the Public Notice, the Bureau had failed to even assign Sky Angel's program access dispute proceeding a file or docket number despite the Complaint being filed on March 24, 2010.

concrete and necessary strides toward resolution of this matter."[22] On April 19, 2012, Sky Angel filed a reply to the Commission's Mandamus Opposition.[23]

In that Mandamus Reply, among other things, Sky Angel explained to the Court that the Public Notice is unnecessary, prejudicial to Sky Angel, procedurally improper, and would further delay resolution of the program access dispute. For instance, Sky Angel noted that, although the Commission argued to the Court that seeking public comment is necessary because the dispute "presents issues of first impression that could have repercussions for a wide range of Internet-based distributors of video programming,"[24] the questions posed in the Public Notice were answered years ago – a fact Sky Angel detailed in its May 2010 Reply. For instance, as discussed in Sky Angel's Mandamus Reply and further detailed below, Congress, the FCC, and the Court have all concluded that the statutory definition of an MVPD is open-ended in its scope, broad in its coverage, and designed to encompass services that did not exist in 1992. Sky Angel also provided the Court with Commission precedent concluding that a service need not be "facilities-based" to qualify as an MVPD. In addition, Sky Angel noted that its May 2010 Reply had provided numerous examples contained in law, regulation, legislative history, and Commission precedent of the term "channel" being used in a vernacular sense.[25]

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[22] *Id.* at 15.

[23] *In re Sky Angel U.S., LLC*, Reply of Sky Angel U.S., LLC to Opposition of Federal Communications Commission to Sky Angel's Petition for Writ of Mandamus, Case No. 12-1119 (filed Apr. 19, 2012) ("Mandamus Reply").

[24] Mandamus Opposition at 15.

[25] Sky Angel also explained that, even if the dispute does present novel questions, a Public Notice issued by the Bureau, rather than the full Commission, is procedurally improper because the Bureau lacks authority to make these determinations. *See* 47 C.F.R. §0.283(c) (requiring that "[m]atters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines" be referred to the Commission en banc for disposition). Thus, if there was a need for public participation in this private adjudication, the full Commission should have sought such comment, and should have done so immediately after the Bureau first stated its belief that there is a "lack of Commission precedent" on the issue of whether Sky Angel qualifies as an MVPD. *See Standstill Order*, 25 FCC Rcd at 3884. In addition, Sky Angel noted to the Court that Commission-level action would provide a more timely opportunity for judicial review, if necessary, because a party may only seek judicial review of a full Commission decision. *See* 47 C.F.R. §1.115(k).

Sky Angel further explained that, contrary to the Commission's assertion, a particularized finding that Sky Angel qualifies as an MVPD would not have "far-reaching" implications – another fact Sky Angel had emphasized in its May 2010 Reply.[26] For instance, Sky Angel provides real-time, linear feeds of programming networks, identical to "traditional" MVPDs, while most, if not all, other distributors that provide content via hardware connected to a broadband Internet connection offer only non-linear, on-demand content. In addition, unlike the vast majority of Internet-based video distributors, Sky Angel does not distribute programming on the World Wide Web, but rather relies in part on subscribers' broadband Internet connections as one path in its distribution system. "Internet" and "World Wide Web" are discrete terms. "Internet" is a broad term that encompasses the various technology, paths, and equipment that allow the exchange of information.[27] In contrast, the "World Wide Web" is a particular form of communication that utilizes the Internet to make information publicly accessible via any connected computer terminal.[28] Accordingly, a distributor such as Sky Angel, which simply uses a broadband Internet connection as a conduit to distribute encrypted video programming to a proprietary set-top box, cannot be considered the functional equivalent of a web-based video

[26] *See Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009 (9th Cir. 1980) ("[A]n agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application."); *First Bancorp. v. Bd. of Governors of the Federal Reserve System*, 728 F.2d 434, 438 (10th Cir. 1984) (Because "the Board's order contain[ed] no adjudicative facts having any particularized relevance to the petitioner," the court "conclude[d] that the Board abused its discretion by improperly attempting to propose legislative policy by an adjudicative order.").

[27] *See* 47 U.S.C. §231(e)(3) ("The term 'Internet' means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit information."); *Reno v. ACLU*, 521 U.S. 844, 849 (1997) ("The Internet is an international network of interconnected computers."); *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4869, n. 23 (2004) ("In essence, the Internet is a global, packet-switched network of networks that are interconnected through the use of the common network protocol – IP … No single entity controls the Internet, for it is a worldwide mesh or matrix of hundreds of thousands of networks, owned and operated by hundreds of thousands of people.").

[28] *See* 47 U.S.C. §231(e)(1) ("The term 'by means of the World Wide Web' means by placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol or any successor protocol."); *Reno*, 521 U.S. at 852 ("The best known category of communication over the Internet is the World Wide Web…").

programming provider, which uses a website to make programming publicly available to any computer terminal able to access the World Wide Web.

III. CONGRESS INTENDED FOR THE TERM "MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTOR" TO BE INTERPRETED BROADLY

As the Bureau notes, Congress enacted an MVPD definition open-ended in scope[29] and "broad in its coverage."[30] As such, the definition "should be given broad, sweeping application."[31] Congress undoubtedly created this open-ended definition to allow the Commission to fully effectuate the "broad and sweeping terms" of the program access provisions,[32] and thereby achieve their "expansive goals."[33] Congress recognized that various non-cable competitors require access to vertically-integrated programming in order to attain these goals. In other words, Congress' intent was not to advance particular alternative technologies, but to generally provide competition to monopoly cable operators. Thus, because of this primary purpose to open the video distribution market to new competitors, it would be unreasonable to "believe that Congress intended to create a competitive video marketplace by giving one competitor a regulatory option that would be unavailable to all others."[34]

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[29] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, 8 FCC Rcd 194, 195, n. 13 (1992) ("[T]he complete scope of this definition is unclear…").

[30] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Notice of Proposed Rule Making, 7 FCC Rcd 8055, 8065 (1992) ("*Program Carriage NPRM*").

[31] *NCTA v.* FCC, 567 F.3d 659, 664 (D.C. Cir. 2009) ("[S]tatutes written in broad, sweeping language should be given broad, sweeping application.").

[32] *Id.*

[33] *Cablevision Systems Corp. v. FCC*, 649 F.3d 695, 706 (D.C. Cir. 2011) ("[T]he conference report emphasizes the statute's expansive goals…").

[34] *Implementation of Section 302 of the Telecommunications Act of 1996*, Second Report and Order, 11 FCC Rcd 18223, 18238 (1996) ("*Section 302 Order*"); *see id.* ("Indeed, it is because of the 1996 Act's expressed goal of promoting competition in all telecommunications markets, including the video market, that we believe Congress intended qualifying LECs and others to have the ability to offer open video services. Moreover, if one of the objectives of the open video option is to encourage new entrants, it should be available to all new entrants…").

Congress' technology-neutral policy with respect to promoting non-cable competitors[35] also included services that did not exist in 1992. "Hardly clairvoyant, especially with respect to rapidly evolving technologies,"[36] Congress recognized that it could not foresee the future of video distribution, including which technologies ultimately could constrain cable's monopolistic tendencies.[37] In fact, Section 628 expressly states that a purpose of the program access provisions is "to spur the development of communications technologies."[38] Congressional reports, legislative history, and Commission precedent further demonstrate that Congress did not intend to limit the MVPD definition only to those video programming distributors that existed twenty years ago:

- "A principal goal of H.R. 4850 is to encourage competition from alternative and new technologies…"[39]
- "[T]he Tauzin amendment includes all existing technologies – C-band satellite – as well as developing technologies. If the Tauzin language is adopted, the house will not be mandating which distribution systems will make it and which ones won't."[40]
- "There are emerging technologies that can provide competition to cable… The only thing standing in the way of fully developing these emerging technologies is access to programming."[41]

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[35] *See Implementation of Cable Television Consumer Protection and Competition Act*, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 9 FCC Rcd 1902, 1950 (1994) ("*1994 Program Access Order*") ("Congress did not differentiate among the technologies used by competitors in the program access provisions…").

[36] *See Cablevision*, 649 F.3d at 706.

[37] *See* 138 Cong. Rec. S712, S746, 1992 WL 15509 (Jan. 31, 1992) (statement of Sen. Chafee) ("[T]his dramatic technological revolution is just getting started. The technologies of the near future that I have glimpsed in reports and heard about in the media seem to me to come straight out of a science fiction movie. I don't think we quite comprehend what the next decade holds for us in terms of advanced communications.").

[38] 47 U.S.C. §548(a).

[39] H.R. Rep. 102-628, 1992 WL 166238, *27 (June 29, 1992); *see id.* at *44 ("The Committee believes that steps must be taken to encourage the further development of robust competition in the video programming marketplace. Such competition may emerge from a number of sources…").

[40] 138 Cong. Rec. H6487, H6541, 1992 WL 172319 (July 23, 1992) (statement of Rep. Harris).

[41] *Id.* at H6543 (statement of Rep. Thomas).

- "[T]he access to programming provision is designed to stimulate new forms of transmitting… This section will help U.S. industry pioneer new forms of communication."[42]

- "The opportunity for new technologies to provide video service has been seriously undercut by their inability to obtain programming from cable affiliated sources."[43]

- "[M]eaningful program access promotes competition in the video marketplace so that television viewers will have the opportunity to choose among competing cable companies, wireless cable providers, C-band satellite, direct broadcast satellite, and any other new program distribution technology."[44]

- "The program access provisions were designed to ensure that competition to cable develops and to encourage competition from emerging competitors."[45]

- "As Congress recognized in enacting the program access provisions of the 1992 Cable Act, cable operators have the incentive to impede the development of other technologies into a robust competitor."[46]

The Commission has similarly anticipated future, unknown services in drafting rules to address cable's dominant market position.[47] In addition, as further proof that Congress intended for the program access rules to promote competition from all non-cable services, regardless of the technology used, Congress, the FCC, and the courts have consistently noted Section 628's expansive pro-competition, pro-consumer goals without any reference to particular types of non-cable competitors or even to the term "multichannel video programming distributor":

- "There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media."[48]

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[42] 138 Cong. Rec. S587, S591, 1992 WL 13465 (Jan. 29, 1992) (statement of Sen. Adams).

[43] 138 Cong. Rec. S712, S756, 1992 WL 15509 (Jan. 31, 1992) (statement of Sen. McCain).

[44] 138 Cong. Rec. H8671, H8676, 1992 WL 228239 (Sept. 17, 1992) (statement of Rep. Harris).

[45] *EchoStar Communications Corp. v. Fox/Liberty Networks LLC et al.*, Memorandum Opinion and Order, 13 FCC Rcd 21841, 21842 (CSB 1998).

[46] *Section 302 Order*, 11 FCC Rcd at 18322.

[47] *See, e.g., Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, Further Notice of Proposed Rulemaking, FCC 01-263, n. 92 (Sept. 21, 2001) ("*Section 11 FNPRM*") ("Although it is impossible to measure the effect of cable concentration on services that are as yet undefined, our rules should be designed to promote a fertile environment in which such services may grow and develop.").

[48] Cable Act, §2(a)(6); *see id.* at §2(b) ("It is the policy of the Congress in this Act to – (1) promote the availability to the public of a diversity of views and information through cable television and other video distribution media.").

- "[T]he conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies."[49]

- "[T]he Committee has decided to focus on ensuring competitive dealings between programmers and cable operators and between programmers and competing video distributors."[50]

- "The Committee continues to believe that competition is essential both for ensuring diversity in programming and for protecting consumers from potential abuses by cable operators possessing market power."[51]

- "[T]his bill addresses the problem by barring programmers affiliated with cable operators from unreasonably refusing to deal with video distributors."[52]

- "Our legislative effort is designed to prevent such anticompetitive behavior by requiring that programming services not discriminate against non-cable distributors of programming."[53]

- "The Tauzin amendment, very simply put, requires the cable monopoly to stop refusing to deal, to stop refusing to sell its products to other distributors of television programs."[54]

- "The purpose of this legislation is very simple and straightforward: To promote competition in the video industry and to protect consumers from excessive rates and poor customer services where no competition exists… To promote competition, the bill ensures that competitors receive access to cable programming…"[55]

- "The program access requirements of Section 628 have at their heart the objective of releasing programming to the existing or potential competitors of traditional cable systems so that the public may benefit from the development of competitive distributors."[56]

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[49] H.R. Conf. Rep. 102-862, 1992 U.S.C.C.A.N. 1231, 1275 (Sept. 14, 1992).

[50] S. Rep. 102-92, 1992 U.S.C.C.A.N. 1133, 1160 (1991).

[51] H.R. Rep. 102-628, 1992 WL 166238, *44 (June 29, 1992)

[52] 138 Cong. Rec. S579, S582, 1991 WL 5622 (Jan. 3, 1991) (statement of Sen. Danforth).

[53] *Id.* at S590 (statement of Sen. Gore).

[54] 138 Cong. Rec. H6487, H6533, 1992 WL 172319 (July 23, 1992) (statement of Rep. Tauzin); *see id.* at H6507 (statement of Rep. Poshard) ("I was also pleased to support the Tauzin amendment to provide equal access to programming at nondiscriminatory prices by noncable technologies."); *id.* at H6536 (statement of Rep. Synar) ("Without access to programming, new program distribution services will not be able to compete against entrenched cable monopolies.").

[55] 138 Cong. Rec. S16652, S16653, 1992 WL 259585 (Oct. 5, 1992) (statement of Sen. Inouye).

[56] *Implementation of Section 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, First Report and Order, 8 FCC Rcd 3359, 3365 (1993).

- "[T]he concern on which Congress based the program access provisions – that in the absence of regulation, vertically integrated programmers have the ability and incentive to favor affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies such that competition and diversity in the distribution of video programming would not be preserved and protected – persists in the current marketplace."[57]

- "Through Section 628, Congress intended to encourage entry and facilitate competition in the video distribution market by existing or potential competitors to traditional cable systems…"[58]

- "The legislative history of Section 628 demonstrates Congress' deep concern with the cable industry's 'stranglehold' over programming through exclusivity and the market power abuses exercised by cable operators and their affiliated programming suppliers that deny programming to non-cable technologies."[59]

- "[P]reventing vertically integrated cable companies from engaging in unfair dealing over programming … was the primary reason Congress enacted section 628."[60]

Because Congress specifically and primarily intended to forbid practices having an anti-competitive effect on service generally, focusing only on certain types of distributors, or limiting potential competitors to those in existence in 1992, "would have been an odd way to accomplish that result."[61] Accordingly, it would be unreasonable for the Commission to interpret "MVPD" so narrowly as to exclude a competitor such as Sky Angel, whose service furthers Congress' statutory scheme.[62]

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[57] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 17 FCC Rcd 12124, 12153 (2002) ("*2002 Program Access Order*").

[58] *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, 754 (2010) ("*Terrestrial Programming Order*"); *see id.* at 18314 ("In enacting Section 628 as part of the 1992 Cable Act, Congress sought to promote competitive entry of programming distributors competing with cable operators…").

[59] *Section 302 Order*, 11 FCC Rcd at 18321.

[60] *Cablevision*, 649 F.3d at 710.

[61] *NCTA*, 567 F.3d at 664.

[62] *See Teva Pharmaceuticals v. FDA*, 182 F.3d 1003, 1011 (D.C. Cir. 1999) ("A narrow interpretation cannot be reasonable simply because it is narrower than it *could* be; to the contrary that interpretation may in fact be narrower than it *should* be given the purposes of the statutory scheme and congressional intent.") (emphasis in original).

In fact, the Commission itself has previously indicated that Internet-based distributors of video programming qualify for the protections of the program access rules. For instance, it recently found that "a cable or telephone company's interference with the online transmission of programming by … stand-alone video programming aggregators that may function as competitive alternatives to traditional MVPDs would frustrate Congress's stated goals in enacting Sec. 628 of the Act…"[63] Similarly, in 2001, the Commission noted that, "[a]lthough cable, wireless, and satellite currently are the only technologies in use for distribution of subscription video services, other technologies may become commercially viable," including "[s]treaming video over the public Internet or over private, non-cable, fiber-optic networks…"[64]

IV. THE EXPRESSLY NON-EXHAUSTIVE LIST OF EXAMPLES DOES NOT LIMIT THE DEFINITION OF AN MVPD

The Communications Act broadly defines an MVPD as:

> [A] person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.[65]

Had Congress intended to limit the program access protections only to certain multichannel distributors, it would have enacted a specific, limiting definition. Instead, it simply provided a

[63] *Preserving the Open Internet, Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, 17975-76, ¶ 129 (2010) ("*Net Neutrality Order*").

[64] *Section 11 FNPRM*, FCC 01-263, n. 38; *see also OPP Working Paper No. 30; Internet Over Cable: Defining the Future in Terms of the Past*, 1998 WL 567433, *62 (Aug. 1998) ("Whether cable Internet-based services would constitute video programming under Title VI will depend largely upon what content is provided over the Internet and how that content is provided. For example, a basic Internet connection permitting a subscriber to visit Web sites put up by third parties may not be comparable to programming provided by a television broadcast station. In contrast, live video images transmitted across the Internet by the technique known as 'streaming' video might appear much closer to traditional broadcasting, particularly from the point of view of the subscriber.").

[65] 47 U.S.C. §522(13) (emphasis added).

non-exhaustive list[66] of several types of video programming distributors that existed twenty years ago.[67] Notably, the definition even fails to specify several types of video programming distributors now considered "traditional" MVPDs.[68]

The Bureau nevertheless suggests that every MVPD must be similar to those entities specifically enumerated in the statutory definition, and then implies that, as a consequence, an entity must be "facilities-based" and provide a "transmission path" to qualify as an MVPD. In making this suggestion, the Bureau apparently was referring to the principle of *ejusdem generis*, which states that, "where general words follow an enumeration of specific items, the general words are read as applying only to other items akin to those specifically enumerated."[69] This principle, however, "is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty."[70] Accordingly, it "does not control [] when the whole context dictates a different conclusion,"[71] and "it must not be used to defeat the obvious purpose of legislation."[72]

As detailed above, Congress' intent was to generally increase competition to monopoly cable operators and to spur the development of new communications technologies. And it

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[66] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, 2997 (1993) ("*Program Carriage Order*") ("[T]he list of multichannel distributors in the definition is not meant to be exhaustive…").

[67] *See Cablevision*, 649 F.3d at 706-07 ("We [] see no justification for construing Congress's reference to satellite programming withholding in subsection (c)(2) as an effort to prevent the Commission from addressing similar unfair practices that – two decades later – have either the purpose or effect that subsection (b) proscribes.").

[68] *See* Department of Justice, *U.S., et al. v. Comcast Corp., et al.*, Competitive Impact Statement, Case 1:11-cv-00106, p. 10 (filed Jan. 18, 2011) ("*DOJ Competitive Impact Statement*") (noting that "traditional video programming distributors" include "cable overbuilders, also known as broadband service providers," and "telcos," neither of which are enumerated in the MVPD definition).

[69] *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588 (1980).

[70] *Id.*

[71] *Norfolk & Western Railway Co. v. Amer. Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991).

[72] *Gooch v. U.S.*, 297 U.S. 124, 128 (1936); *see U.S. v. Alpers*, 338 U.S. 680, 682 (1950) ("[I]t is to be resorted to not to obscure and defeat the intent and purpose of Congress…")

intended for these goals to be achieved on a "technology-neutral basis."[73] As such, it would be wholly unreasonable to exclude every service that Congress did not expressly include in the definition, especially a service such as Sky Angel which uses a technology unknown to Congress at the time.[74] Accordingly, narrowing the MVPD definition to exclude innovative new services that fit within all of the definition's express terms, and which help to provide the precise competition Congress sought to promote, would defeat the purposes of Section 628.[75]

Moreover, even if Congress intended for all MVPDs to be similar to those specifically enumerated, this would in no way require that a service be facilities-based or directly provide all necessary transmission paths in order to qualify as an MVPD.[76] For instance, one of the listed MVPD services – a television receive-only satellite program distributor (*i.e.*, a C-Band retailer) –

[73] S. Rep. 102-92, 1992 U.S.C.C.A.N. at 1159 ("Without fair and ready access on a consistent, technology-neutral basis, an independent entity … cannot sustain itself in the market."). This technology-neutral policy is consistent with Congress' general approach with respect to pro-consumer, pro-competition regulation. *See*, *e.g.*, S. Rep. 104-230 at 172 (Feb. 1, 1996) ("Recognizing that there can be different strategies, services and technologies for entering video markets, the conferees agree to multiple entry options to promote competition, to encourage investment in new technologies and to maximize consumer choice…"); H. Con. Res. 173, 106th Cong., at 2 (Aug. 5, 1999) ("[T]he Telecommunications Act of 1996 anticipated, and further fueled, the growth of converging digital technology and services by treating competitive service offerings on the basis of the services provided, in a technology-neutral way, and without regard to the historical regulatory antecedents of the provider of that service.").

[74] *See Cablevision*, 649 F.3d at 707 ("[W]e reject petitioners' second argument – that by leaving terrestrial programmers off the list of entities covered by section 628(b), Congress unambiguously placed terrestrially delivered programming beyond Commission jurisdiction… When Congress delegates broad authority to an agency to achieve a particular objective, agency action pursuant to that delegated authority may extend beyond the specific manifestations of the problem that prompted Congress to legislate in the first place.").

[75] *See Harrison*, 446 U.S. at 588 ("This expansive language offers no indication whatever that Congress intended the limiting construction [ ] that the respondents now urge. Accordingly, we think it inappropriate to apply the rule of *ejusdem generis*…"); *Section 302 Order*, 11 FCC Rcd at 18235-36 (finding insignificant the fact that several revisions to the Act, as well as the legislative history, referred to common carriers or telephone companies but not non-LECs because, "given the 1996 Act's overall intent to open all telecommunications markets to competition, [the Commission did] not read the legislative history's focus on telephone companies to mean that Congress intended to deny all others the opportunity to use this new model for delivering video programming.").

[76] Although the Bureau emphasizes Congress' intention to promote facilities-based competition, *see* Public Notice, ¶8, a single reference in one congressional report does not indicate that Congress sought to promote this goal above the broad pro-consumer, pro-competition goals detailed above. Moreover, this single reference cannot control when Section 628(a), which expressly sets forth the purposes of that section, makes no mention of promoting facilities-based competition. In addition, neither the House nor Senate Report, *see* H.R. Rep. 102-628 (June 29, 1992) & S. Rep. 102-92 (June 28, 1992), refer to this alleged overarching goal. In fact, neither report even uses the term "facilities-based," and none of the reports, including the Conference Report, uses the term "transmission path."

is not facilities-based.[77] As a result, the Commission has concluded that an MVPD "need not own its own basic transmission and distribution facilities."[78] Similarly, in concluding that an open video system video programming provider "clearly constitutes" an MVPD, the Commission rejected the argument that programming providers cannot qualify as MVPDs because they do not operate a distribution vehicle, finding the argument "to be unsupported by the plain language of Section 602(13), which imposes no such requirement."[79] Not only does this precedent bind the Bureau,[80] but the Commission lacks the authority to find otherwise even through a full rulemaking proceeding because the conclusion is mandated by the statutory language itself. The Commission therefore cannot now claim that a video distribution service must be facilities-based to qualify as an MVPD.[81]

Also because of Congress' inclusion of television receive-only satellite program distributors, the Commission cannot find that an entity must itself provide every transmission path used to distribute programming to subscribers because "C-Band retailers do not provide a

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[77] *See Harrison*, 446 U.S. at 588 ("The flaw in [respondents' *ejusdem generis*] argument is that at least one of the specifically enumerated provisions in §307(b)(1) … does not require the Administrator to act only after notice and opportunity for a hearing."); *see also Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd 24284, 24491 (1998) (Dissenting Statement of Commr. Harold Furchtgott-Roth) (noting the report "assumes that competition only exists when there is more than one (usually facilities-based) MVPD in an area…") (emphasis added).

[78] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5652 (1993) ("*Rate Regulation Order*") (emphasis added).

[79] *Implementation of Section 302 of the Telecommunications Act of 1996*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20301-02 (1996) ("*Section 302 Recon. Order*") (citing with approval a comment stating that "the fact that most open video system programming providers will use another party's network has no relevance under Section 602(13)") (emphasis added).

[80] *See AFL-CIO v. FLRA*, 777 F.2d 751, 759 (D.C. Cir. 1985) ("[A]n agency seeking to repeal or modify a legislative rule promulgated by means of notice and comment rulemaking is obligated to undertake similar procedures to accomplish such modification or repeal."); *Washington Legal Found. v. Henney*, 202 F.3d 331, 336 (D.C. Cir. 2000); *Global Crossing Telecomm'ns, Inc. v. FCC*, 259 F.3d 740, 746 (D.C. Cir. 2001).

[81] *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, n. 30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.") (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

delivery system to subscribers…"[82] More generally, the Bureau has failed to cite any statutory provision or legislative history that even implies that Congress intended for every MVPD to provide a transmission path.[83] In fact, the only time Congress included "transmission path" in the Title VI definitions was in describing a "cable system," and it used the term "closed transmission path."[84] Of the specifically enumerated MVPD services, only a cable operator provides a closed transmission path.[85] All other MVPDs, to the extent they provide any transmission paths, provide only open transmissions that can be received by any party that has the appropriate home equipment – *e.g.*, in the case of DBS, a small satellite dish and the associated set-top box.

On the other hand, like DBS, MMDS, or SMATV, Sky Angel owns or controls significant and essential transmission paths, including the originating and terminating points. Programming is delivered to Sky Angel through multiple satellite uplinks and downlinks controlled by Sky Angel. Sky Angel then encodes, bundles, and encrypts the programming, which it transmits by fiber – a closed transmission path – it controls to headends in New York City and Palo Alto, from where the programming is sent via broadband Internet connections to

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[82] *See Turner Vision, Inc. et al. v. Cable News Network, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 12610, 12635 (CSB 1998) ("CNN argues that C-Band retailers do not provide a delivery system to subscribers and that Complainants' program access protection is somehow dependent upon their ownership of transmission facilities. We reject this contention.") (emphasis added).

[83] The Bureau asks whether "MVPD" and "channel" should be interpreted to require that an entity make available a transmission path due to the "fact that many of the legal requirements applicable to MVPDs presume that the MVPD provides facilities." Public Notice, ¶ 8. But the Bureau provides no evidence to support this inaccurate statement. All of the cited rule sections either apply exclusively to cable operators and/or wireless MVPDs. *See* Public Notice, n. 9. The Bureau cannot reasonably rely on operational requirements that apply only to some MVPDs to limit the general statutory definition applicable to all MVPDs, especially because that definition expressly encompasses a non-facilities-based service.

[84] *See* 47 U.S.C. §522(7).

[85] *See Definition of a Cable Television System*, Report and Order, 5 FCC Rcd 7638, 7639 (1990) ("[B]oth bodies of Congress expressed virtually identical views concerning the types of services – DBS, MDS, and STV – that were not considered cable systems. All of these services used radio waves (without physical conduction media or devices) and thus stand in sharp contrast to the 'closed transmission paths' referred to in both the Senate and House versions of the Act.").

subscribers' homes. Certain long-recognized MVPDs likewise require subscribers to have access to and utilize an independent transmission service. For instance, without their home telephone lines, DBS subscribers can only access limited programming. Similarly, a SMATV provider distributes programming "to the residents through the *building's private cable distribution network*."[86] In contrast, Sky Angel even controls a transmission path within a subscriber's home because its encrypted programming cannot be viewed without the proprietary set-top box, which Sky Angel directly and remotely controls at all times for purposes ranging from periodic service and software updates to service activation or termination. Thus, Sky Angel does, in fact, control essential transmission paths. And Sky Angel's subscribers, through monthly payments to Internet service providers, lease the only portion of Sky Angel's distribution system it does not directly control – *i.e.*, the broadband Internet conduits connecting the headends to subscribers' homes.

In addition, Sky Angel's service clearly qualifies as an MVPD because it is identical to "traditional" MVPDs from the perspective of a consumer, for whose benefit Congress created the program access requirements. Under similar circumstances, to determine whether one communication service is "like" another, both the courts and the Commission have used a "functional equivalency" test, the "linchpin" of which "is customer perception."[87] The test's focus is "practical, oriented to customers: what function or need do customers perceive to be satisfied by the services under examination?"[88] Thus, two services that use different transmission technologies still are "like" one another if "they perform a similar communication

[86] *Rate Regulation Order*, 8 FCC Rcd at 5651 (emphasis added).

[87] *Inquiry Into the Existence of Discrimination in the Provision of Superstation and Network Station Programming*, Report, 5 FCC Rcd 523, 530 (1989); *see Ad Hoc Telecomm'ns Users Committee v. FCC*, 680 F.2d 790, 796 (D.C. Cir. 1982) ("[T]he functional equivalency test, with customer perception as a linchpin, is an appropriate standard for determining section 202(a) 'likeness.'") (internal citation omitted).

[88] *Ad Hoc Committee*, 680 F.2d at 797.

function, are perceived by the customer as similar services and their demand appears to be highly cross-elastic."[89] This test of "likeness" is consistent with Congress' treatment of all communications services, including video distribution services, and therefore is relevant in a variety on contexts.[90]

Exactly like cable or DBS, a Sky Angel subscriber inputs a wire into a set-top box which connects directly to a television set, and then accesses multiple live, linear video programming networks using an on-screen channel guide and typical handheld remote control. Clearly, cable or DBS and Sky Angel perform similar communication functions and are perceived as similar services. Subscribers are interested in receiving a diverse lineup of quality programming directly to their television sets at affordable rates, without regard to the invisible details of the intervening technology used to provide that programming.[91] Thus, even if all MVPDs must be similar to those services enumerated in the statutory definition, Sky Angel still qualifies as an MVPD entitled to the pro-consumer, pro-competition protections of the program access rules because it provides a video programming distribution service functionally identical to other MVPDs.

V. CONGRESS USED THE TERM "MULTIPLE CHANNELS" TO MEAN "MULTIPLE VIDEO PROGRAMMING NETWORKS"

Interpreting "multiple channels" to mean "multiple video programming networks" is consistent with Congressional intent and the Commission's own rules and precedent. In fact, it

[89] *American Telephone & Telegraph Co.*, Opinion, 62 FCC 2d 774, ¶ 75b (1977).

[90] *See, e.g.*, H. Con. Res. 173, 106th Cong., 1st Session, at 3 (Aug. 5, 1999) (expressing "the intent of Congress to rely not on the historical antecedents of the providers of telecommunications services or cable services, or the facilities utilized to deliver a service, but rather on the nature of the service itself in determining its regulatory treatment."); H.R. Rep. 98-934, 1984 U.S.C.C.A.N. 4655, 4680 (Aug. 1, 1984) ("This distinction between cable services and other services offered over cable systems is based upon the nature of the service provided, not upon technological evaluation of the two-way transmission capabilities of cable systems.").

[91] *See* 138 Cong. Rec. S712, S742, 1992 WL 15509 (Jan. 31, 1992) (statement of Sen. Metzenbaum) ("The program access provisions of S. 12 set a technology-neutral policy that will help consumers and promote competition. Consumers are interested in getting cable programming, Mr. President. They are less interested in the technology which is used to deliver that programming to their home.").

is the only reasonable interpretation of the term. Congress did not provide, either explicitly or by reference, a technical definition for "channels" as that term is used in the MVPD definition. In fact, the sole Title VI definition of "channel" is expressly synonymous with "cable channel," and, by its own terms, limited to a cable system:

> [T]he term "cable channel" or "channel" means a portion of the electromagnetic frequency spectrum which is used in a cable system…[92]

The only other "channel" definitions noted in the Public Notice, or at any time in Sky Angel's program access proceeding, relate solely to over-the-air broadcast television channels.[93] Because various types of video programming distributors, each with its own unique distribution methods, are both specifically and traditionally classified as MVPDs, and because a broadcast television station is not an MVPD, no definition of channel expressly limited to a cable system or a broadcast television signal can rationally be used to limit what constitutes an MVPD.[94]

In fact, because "Congress did not differentiate among the technologies used by competitors in the program access provisions,"[95] "channels" cannot be defined by any technology-specific reference. Accordingly, interpreting "channels" in a way that narrows the MVPD definition to include only cable systems, or to apply to only certain technologies, would

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[92] 47 U.S.C. §522(4) (emphasis added). Similarly, the Commission's Part 76 definitions include only definitions of a "cable television channel," not a channel generally, and these definitions all involve "[a] signaling path provided by a cable television system..." *See* 47 C.F.R. §76.5(r)-(u) (emphasis added).

[93] *See* Public Notice, ¶ 3 and n. 31.

[94] Therefore, contrary to the Bureau's suggestion, defining "multiple channels" to mean "multiple programming networks" would not ignore a statutorily defined term because Congress only defined a "cable channel," which is always "used in a cable system." Congress did not define a channel with respect to any other MVPD. Thus, there is no statutorily defined term to ignore.

[95] *1994 Program Access Order*, 9 FCC Rcd at 1950; *see* S. Rep. 102-92, 1992 U.S.C.C.A.N. at 1161 ("To encourage competition to cable, the bill bars vertically integrated … programmers from unreasonably refusing to deal with any multichannel video distributor…") (emphasis added); 47 C.F.R. §76.1002(b)(1), n. 2 (listing potentially reasonable factors for differences in treatment so long as these factors are "applied in a technology neutral fashion.").

impermissibly restrict the intended breadth of the definition and, in effect, exclude new entrants in favor of incumbents.[96]

Use of the cable-specific definition of "channel" to restrict the type of entity that qualifies as an MVPD also would be contrary to many of the definition's specifically enumerated examples.[97] Neither DBS nor MMDS utilize "a portion of the electromagnetic frequency spectrum which is used in a cable system" because neither is, by definition, a cable system.[98] Defining "multiple channels" in this way even would remove many cable systems from the regulatory benefits and obligations that apply to MVPDs generally but not specifically to cable operators. For example, in order to address capacity problems, many cable operators have turned to Switched Digital Video, whereby "a channel is transmitted … only when the subscriber tunes to that channel."[99] In other words, from a technical perspective, many cable systems now transmit only a single "cable channel" (*i.e.*, "portion of electromagnetic frequency spectrum") to each home rather than simultaneously transmit "multiple channels" to every subscriber.[100] Thus, as a result of technological innovations, many traditional cable system MVPDs would not qualify as such under the Bureau's suggested interpretation of "MVPD."[101]

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[96] *See AFL-CIO*, 777 F.2d at 754 ("[W]hile reviewing courts should uphold reasonable and defensible agency constructions of their organic statutes, they should not 'rubber stamp … administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'") (quoting *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 (1983)).

[97] *See Holloway v. U.S.*, 526 U.S. 1, 9 (1999) (rejecting petitioner's interpretation because it "would exclude from the coverage of the statute most of the conduct that Congress obviously intended to prohibit.").

[98] Nor do these MVPDs use a "signaling path as provided by a cable television system…" *See* 47 C.F.R. §76.5(r)-(u) (defining the various cable television channel classes).

[99] *Carriage of Digital Television Broadcast Signals*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064, 21095 (2007) (emphasis added); *see id.* ("[S]witched digital gives cable operators the means of adding channels and never running out of capacity.").

[100] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 673 (2009) ("*13th Competition Report*") ("Rather than transmitting all available channels to viewers at once…") (emphasis added).

[101] *See Section 302 Order*, 11 FCC Rcd at 18262 ("[T]here is no meaningful definition of a 'channel' in a digital world…") (emphasis added).

Rather than "indicate that Congress intended for the pre-existing definition of 'channel' to apply in interpreting the term 'MVPD,'"[102] the fact that Congress did not alter the pre-existing definition when it enacted the MVPD definition further demonstrates that the "cable channel" definition does not apply. Congress defined an "MVPD" in the same section of the Act that it defined a "cable channel," and yet it did not revise the cable channel definition even though, by its subject and express terms, that definition cannot be used to help define any video distribution service other than a cable system. Moreover, although Congress renumbered the subsection defining a "cable channel" and amended the statutory definition of a "cable service" in 1996, it again did not revise the definition of a "cable channel" or adopt any "channel" definition that could reasonably be used in determining the scope of the MVPD definition.

Accordingly, it is not only reasonable, but mandatory, for the Commission to interpret "MVPD" without reference to the earlier-adopted and never revised definition of a "cable channel,"[103] even though the two definitions are found in the same statutory section. Although there is a "presumption that a given term is used to mean the same thing through a statute," "this presumption is not absolute."[104] Rather, it "*yields readily* to indications that the same phrase used in different parts of the same statute means different things…"[105] This is because "most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute *or even*

[102] *See* Public Notice, ¶ 7.

[103] As the Bureau noted, the 1984 Cable Act "focused exclusively on the regulation of cable television." Public Notice, ¶ 7. *See Amer. Scholastic TV Programming Found. v. FCC*, 46 F.3d 1173, 1179 (D.C. Cir. 1995) ("The singular focus on the regulation of cable systems holds throughout the Act."); *id.* at 1180, n. 5 ("The 1992 Amendments to the Act include some references to the 'multichannel video market' generally… These amendments, of course, do not elucidate the intent of the earlier Act.").

[104] *Barber v. Thomas*, 130 S.Ct. 2499, 2506 (2010).

[105] *Id.* (emphasis added).

in the same section."[106] Congress' stated purposes for enacting the program access requirements and its substantial use of "channels" in a common, non-technical, everyday manner demonstrate that the existing "cable channel" definition was not intended to be used in defining an MVPD.[107]

In fact, the Supreme Court consistently finds, "absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning."[108] This is because of "the assumption that the ordinary meaning of [statutory] language accurately expresses the legislative purpose."[109] Here, no "sufficient indication" exists that Congress used the term "multiple channels" to mean anything but "multiple video programming networks." Thus, the inquiry should end there. However, a further analysis simply reinforces this finding because the meaning of a statutory term "depends on the purpose with which it is used in the statute and the legislative history of that use."[110] As detailed above, the clear intent of the program access regime is to increase competition, encourage new communications technologies, and protect a consumer's ability to access one or more programming networks – *i.e.*, The Discovery Channel or other programming "channels" –

[106] *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (emphasis added).

[107] *See id.* at 576 ("Context counts").

[108] *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partn.*, 507 U.S. 380, 388 (1993); *see Walters v. Metro. Ed. Enter., Inc.*, 519 U.S. 202, 207 (1997) ("In the absence of an indication to the contrary, words in a statute are assumed to bear their ordinary, contemporary, common meaning."); *Richards v. U.S.*, 369 U.S. 1, 9 (1962) ("[W]e must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used."); *Roberts v. Sea-Land Servs., Inc.*, 132 S.Ct. 1350, 1356 (2012) ("The LHWCA does not define 'awarded,' but in construing the Act, as with any statute, we look first to its language, giving the words used their ordinary meaning.").

[109] *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985).

[110] *Helvering v. Hammel*, 311 U.S. 504, 507 (1941); *see Crandon v. U.S.*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."); *Roberts*, 132 S.Ct. at 1357 ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

from its preferred distributor at affordable rates.[111] "Any reasonable interpretation of the statute, therefore, must harmonize with this goal."[112]

In addition, the legislative history leaves no doubt that Congress used "multiple channels" to mean "multiple video programming networks."[113] The consistent use of the term in this way by members of both chambers, including the authors and sponsors of the bills that became the Cable Act, is significant "because legislators who heard or read those statements presumably voted with that understanding."[114] Such use also comports with Congress' use of other potentially technical terms in an everyday sense.[115] The following are some of the instances in which Congress clearly used "channels" to mean "video programming networks":

- "It is difficult to believe a cable system would not carry the sports channel, ESPN, or the news channel, CNN."[116]
- "[T]he number of cable channels has not dwindled and faded under regulation. On the contrary, it has grown … from 79 channels to 128 channels in 1994."[117]
- "Many cable companies across the country are moving popular program channels such as ESPN and Turner Network Television off the basic tier in order to insulate them from any future regulatory scheme that might be imposed by the FCC."[118]

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[111] *See Environmental Defense*, 549 U.S. at 574 ("A given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies."); *Jarecki G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) ("[A] word is known by the company it keeps.").

[112] *IRS v. Engle*, 464 U.S. 206 (1984); *see Holloway*, 526 U.S. at 9 ("Because that purpose is better served by construing the statute to…, the entire statute is consistent with a normal interpretation of the specific language that Congress chose.").

[113] *See Ass'n of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) ("This common-sense reading of the Act is amply borne out by its legislative history.").

[114] *D.C. v. Heller*, 554 U.S. 570, 605 (2008); *see U.S. v. Locke*, 471 U.S. 84, 95 (1985) ("Congressmen typically vote on the language of a bill … [as] expressed by the ordinary meaning of the words used.").

[115] *See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd 5298, 5356 (1999) ("'Transmission technology' is not a defined term in the Communications Act nor does the legislative history help to define its breadth. Rather, Congress appears to have used the phrase in the everyday sense in which it has been used in discussions of communications policy issues.") (emphasis added).

[116] S. Rep. 102-92, 1992 U.S.C.C.A.N. at 1157.

[117] H.R. Rep. 104-204, p. 228 (Jul. 24, 1995).

[118] 137 Cong. Rec. S2006, S2012, 1991 WL 19499 (Feb. 20, 1991) (statement of Sen. Metzenbaum); *see id.* ("[P]opular program channels … like CNN, ESPN, and Turner Network Television… Premium movie channels such as HBO and Showtime…").

- "Cable companies are allowed to own cable systems and the channels that provide programming for the cable systems…"[119]

- "To avoid the possibility of rate regulation, cable companies are moving popular cable channels, like CNN and TBS, from their lowest-priced tier to more expensive expanded basic tiers."[120]

- "NBC, one of the three principal television networks, decided that it wanted to develop a cable news channel to compete with CNN."[121]

- "[P]remium movie channels – for example HBO and Cinemax…"[122]

- "A key part of the cable industry's strategy is to control the popular cable program channels which are carried on systems around the country."[123]

- "[M]any operators are shifting popular cable channels – such as ESPN, TNT, and USA – off the basic tier in order to prevent such networks from being regulated."[124]

- "TCI launched a new movie channel called Encore."[125]

- "Look at these specific examples, covering almost all the major programming channels, those which make up what most of us think of as cable. Here is AMC/Bravo… Here is ESPN…"[126]

- "We were told one of the cable operators dropped 'The Learning Channel' so the value of the channel would decline."[127]

- "The fatal defect of this amendment is that it shields from regulation the very program channels which impel people to buy cable in the first place… Program

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[119] 138 Cong. Rec. S400, S408, 1992 WL 11815 (Jan. 27, 1992) (statement of Sen. Ford).

[120] *Id.* at S413 (statement of Sen. Danforth). Sen. Danforth sponsored Senate bill S.12, the "Cable Television Consumer Protection and Competition Act of 1992." *See FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) ("As a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute.").

[121] 138 Cong. Rec. S400, S426, 1992 WL 11815 (Jan. 27, 1992) (statement of Sen. Gore, a co-sponsor of S.12).

[122] 138 Cong. Rec. S587, S589, 1992 WL 13465 (Jan. 29, 1992) (statement of Sen. Helms); *see id.* ("HBO and other movie channels."); *id.* ("[C]hannels like the Disney Channel.").

[123] 138 Cong. Rec. S561, S565 (Jan. 29, 1992) (statement of Sen. Metzenbaum, a co-sponsor of S.12); *see id.* ("The big cable companies frequently have refused to sell program channels they control to these potential competitors…").

[124] *Id.* at S566 (statement of Sen. Metzenbaum).

[125] *Id.* at S561 (statement of Sen. Gorton, a co-sponsor of S.12).

[126] 138 Cong. Rec. S712, S737, 1992 WL 15509 (Jan. 31, 1992) (statement of Sen. Gore).

[127] *Id.* at S740 (statement of Sen. Wirth); *see id.* ("[A] premium channel such as Showtime, HBO or the Disney Channel…").

channels like ESPN, CNN, MTV, TNT, and USA were staples of basic cable. People would subscribe to basic cable because they could not get these channels through conventional over-the-air TV reception."[128]

- "[B]asic cable program channels such as MTV and CNN…"[129]

- "Alternative multichannel technologies like wireless cable and the satellite dish industry are poised to compete with cable. But they cannot be effective competitors unless they can deliver popular program channels to their customers. Unfortunately, the cable industry has refused to make their program channels available to potential competitors on fair terms and at nondiscriminatory prices."[130]

- "[T]he number of cable channels has increased dramatically. The proceedings of the House are now available across America via C-SPAN. Millions were able to watch the gulf war live on CNN. Local news channels are proliferating. It appears that there is, or will soon be, a channel for every state."[131]

- "We have television channels devoted exclusively to sports, weather, health, rock music, around-the-clock news."[132]

- "HBO and other premium channels…"[133]

- "What I am thinking of, in particular, are certain premium movie channels. HBO and Cinemax come most readily to mind."[134]

- "[P]opular advertiser-supported channels like CNN and ESPN, and premium cable channels like HBO."[135]

- "In many areas throughout the country, cable customers have access not just to dozens but to scores of cable channels. C-SPAN and CNN have literally changed the way Americans receive information about politics, government, and local, national, and international events."[136]

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[128] *Id.* at S741 (statement of Sen. Metzenbaum).

[129] *Id.* at S742 (statement of Sen. Metzenbaum).

[130] *Id.* (statement of Sen. Metzenbaum).

[131] 138 Cong. Rec. H6487, H6500, 1992 WL 172319 (July 23, 1992) (statement of Rep. Dingell).

[132] *Id.* at H6504 (statement of Rep. Price).

[133] *Id.* at H6525 (statement of Rep. Cooper).

[134] *Id.* at H6530 (statement of Rep. Broomfield).

[135] 138 Cong. Rec. H6546, H6558, 1992 WL 172324 (July 23, 1992) (statement of Rep. Markey). Rep. Markey sponsored House bill H.R.4850, the "Cable Television Consumer Protection and Competition Act of 1992."

[136] 138 Cong. Rec. H8671, H8673, 1992 WL 228239 (Sept. 17, 1992) (statement of Rep. Rinaldo).

- "They enjoy CNN, ESPN, MTV, and dozens of other channels."[137]

As these quotes demonstrate without a doubt, the legislative history of the Cable Act "belies any suggestion that Congress, despite its use of broad language in the [MVPD definition] itself, intended to" define channels in a technical sense, particularly in a way expressly limited only to cable systems.[138]

Similarly, the Commission itself has interpreted the MVPD definition according to the plain meaning of its terms,[139] and has consistently used the term "channels" to refer to multiple programming networks. The Commission's use of "channel" in this non-technical sense began prior to the Cable Act, which likely influenced Congress' use of the term. For example:

- "Cable operators are including more program choices on the lowest level basic tiers, including a larger number of non-broadcast program channels (*e.g.*, the Discovery Channel, MTV, CNN, USA, ESPN, etc.)."[140]
- "ESPN is a national sports channel…"[141]
- "Nick at Nite, a cable channel…"[142]
- "[I]n order to prosper, [satellite operator] SkyPix will have to gain access to additional programming, such as popular basic cable channels."[143]

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[137] 138 Cong. Rec. S14600, S14613, 1992 WL 234151 (Sept. 22, 1992) (statement of Sen. Chafee).

[138] *Algonquin*, 426 U.S. at 570; *see Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

[139] *See Rate Regulation Order*, 8 FCC Rcd at 5648 ("We construe this term according to the plain meaning of the statute as applying to entities that distribute, *i.e.*, make available to customers or subscribers, more than one channel of video programming…") (emphasis added).

[140] *Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, Notice of Proposed Rulemaking, 5 FCC Rcd 259, 261 (1990).

[141] *Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, Further Notice of Proposed Rulemaking, 6 FCC Rcd 208, 222, n. 27 (1990) ("*Effective Competition FNPRM*"); *see also ACLU v. FCC*, 823 F.2d 1554, 1559, n. 3 (D.C. Cir. 1987) ("Nonbasic cable services typically include the 'premium' movie and sports channels such as HBO and Sportschannel.").

[142] *OPP Working Paper No. 26: Broadcast Television in a Multichannel Marketplace*, 6 FCC Rcd 3996, 4056, n. 102 (1991).

[143] *Id.* at 4061; *see id.* at 4068 ("Aggregating enough channels for a commercially viable service, however, is often difficult."); *id.* at 4076-77 ("In 1990, four basic cable channels had prime-time ratings of 1.0 or better.").

- "Among the most popular basic cable channels are WTBS, USA, ESPN, and TNT."[144]

Further, in orders and reports required by the Cable Act, the Commission continued to use "channel" to mean a "video programming network":

- "Congress appeared to contemplate carriage of broadcast-affiliated cable channels as part of legitimate retransmission consent negotiations."[145]

- "Cable programmers strive to build an identity for their channel that is recognizable and sought-after by viewers. For example, when an MVPD loses access to a popular national news channel, there is little competitive solace that there is a music channel or children's programming channel to replace it. Even when there is another news channel available, an MVPD may not be made whole because viewers desire the programming and personalities packaged by the unavailable news channels."[146]

- "There are nearly 30 premium channels available, including National Geographic Channel, Disney Channel, Animal Planet, Discovery Channel, Cartoon Network, CNN, and HBO."[147]

The Commission has similarly used "channel" in this way in various other orders,[148] and has recently defined a "linear channel" as "[v]ideo content that is delivered in a scheduled mode,

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[144] *Id.* at 4089, n. 183.

[145] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17865 (2007) ("*2007 Program Access Order*").

[146] *2002 Program Access Order*, 17 FCC Rcd at 12139.

[147] *13th Competition Report*, 24 FCC Rcd at 678; *see also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Second Annual Report, 10 FCC Rcd 2060, 2150 (1995) ("*Second Competition Report*") ("MMDS would be used to provide one-way broadcasts of multiple cable channels…"); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd 1606, 1700 (2004) ("Of the 84 regional cable channels identified this year, 27, or 33%, are sports channels.").

[148] *See, e.g.*, *Implementation of the Satellite Home Viewer Improvement Act of 1999*, First Report and Order, 15 FCC Rcd 5445, 5463 (2000) ("For example, a broadcaster might initially propose that, in exchange for carriage of its signal, an MVPD carry a cable channel owned by, or affiliated with, the broadcaster."); *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc., For Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4286 (2011) ("*Comcast Order*") ("CNBC, the number one business news channel, and MSNBC, the second-rated cable news channel."); *id.* ("Five of NBCU's cable channels generate over $200 million in annual operating cash flow."); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., et al. to Time Warner Cable Inc., et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8367 (2006) (Dissenting Statement of Commr. Michael J. Copps) ("Both Comcast and Time Warner have ownership stakes in popular cable channels."); *id.* ("If an aspiring cable channel cannot win carriage on these big concentrated networks, its fate is sealed. It's doomed. And the record is full of examples of channels that will never get to your television.").

such as through broadcast or cable network channels."[149] In addition, Section 79.1 of the Commission's rules – which expressly applies the same definition of MVPD as the program access rules – uses the term "channel" in a non-technical sense in creating exemptions for video programming providers, who are not distributors at all and clearly do not offer any sort of transmission path:

- "No video programming provider shall be required to expend any money to caption any video programming if such expenditure would exceed 2% of the gross revenues received from that channel…"[150]

- "No video programming provider shall be required to expend any money to caption any channel of video programming producing annual gross revenues of less than $3,000,000 during the previous calendar year…"[151]

Congress' use of "multichannel" and "channels" in a common, everyday sense is further demonstrated by the Commission's effective competition rulemaking, which various lawmakers referenced during the Cable Act debates.[152] The Commission initiated that proceeding because the then-current standard, which centered on the availability of three broadcast signals in a market, "no longer provide[d] a correct measure of effective competition to the full range of cable service."[153] The Commission noted that "consumers subscribe to basic cable service for the large number and wide variety of programming services it delivers directly to the home," that

[149] *Second Competition Report*, 10 FCC Rcd at 2150.

[150] 47 C.F.R. §79.1(d)(11).

[151] 47 C.F.R. §79.1(d)(12); *see* 47 C.F.R. §79.1(f)(1) ("A video programming provider, video programming producer or video programming owner may petition the Commission for a full or partial exemption from the closed captioning requirements. Exemptions may be granted, in whole or in part, for a channel of video programming…") (emphasis added); *see also Closed Captioning and Video Description of Video Programming*, Report and Order, 12 FCC Rcd 3272, 3278 (1997) ("[C]ompliance is measured on a channel-by-channel basis, and thus the captioned programs will reflect the overall diversity of the many channels of programming now available…"); *id.* at 3309 ("[B]y measuring compliance on a channel-by-channel basis, a network will be able to set budgets and hire staff based on the requirements applicable for its own programming, without having to factor in the efforts of others.").

[152] *See, e.g.*, 137 Cong. Rec. S18336, S18377 (Nov. 26, 1991) (statement of Sen. Leahy); 138 Cong. Rec. S400, S413 (Jan. 27, 1992) (statement of Sen. Danforth); 138 Cong. Rec. S712, S746 (Jan. 31, 1992) (statement of Sen. Chafee).

[153] *Effective Competition FNPRM*, 6 FCC Rcd at 209.

"the most widely subscribed-to tier of service on average ha[d] expanded to include significant amounts of programming beyond the retransmission of local broadcast signals," and that "audience statistics indicate[d] that nonbroadcast cable programming ha[d] attracted an increasing share of the audience in cable homes."[154] The Commission further noted that "cable offers general interest channels, such as USA Network and Turner Network Television (TNT)," and a "wide array of specialized cable services like CNN, ESPN, MTV, Nickelodeon, BET and C-SPAN" that are "not available over-the-air."[155]

Because cable offered such a wide variety of programming options, the Commission concluded that "a small number of broadcast signals alone generally cannot deliver comparable service."[156] The Commission therefore revised the effective competition standard to require "at least six unduplicated over-the-air broadcast signals,"[157] "the presence of another multichannel provider that offers multiple channel options,"[158] or a showing of effective competition under the "competitive behavior test."[159] Stated differently, the Commission amended the standard because three broadcast signals no longer presented effective competition to cable's wide array of various video programming networks. Rather, because of the altered nature of basic cable service, cable operators could only face effective competition from a larger variety of programming networks, such as six broadcast stations or another service that provides numerous

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[154] *Id.*

[155] *Id.*

[156] *Id.*; *see id.* ("In sum, it is clear that the three signal standard no longer reflects effective competition to the full range of cable television service").

[157] *Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, Report and Order and Second Further Notice of Proposed Rulemaking, 6 FCC Rcd 4545, 4547 (1991) ("*Effective Competition Order*"); *see Implementation of the Provisions of the Cable Communications Policy Act of 1984*, Report and Order, 50 FR 18637, 18649 (1985) ("The number of over-the-air broadcast signals required to provide effective competition to basic cable service must be sufficient to allow viewers adequate and significant programming choices.").

[158] *Effective Competition Order*, 6 FCC Rcd at 4551.

[159] *Id.* at 4554.

programming options.[160] In other words, the Commission concluded that, regardless of the type of service or technology used, the availability of multiple video programming networks was necessary to provide effective competition to entrenched cable systems.[161]

Congress came to this same conclusion in enacting the program access rules. And, because it expressly referenced the Commission's order revising the effective competition standard in doing so,[162] Congress similarly sought to promote the availability of other services that offer multiple video programming networks in recognition of the fact that this type of service, regardless of the technology used, is necessary to provide true competition to cable, and thereby constrain the anti-competitive cable practices Congress sought to address.

In sum, because Congress did not define "channels" as used in the MVPD definition, because interpreting "multiple channels" to mean "multiple video programming networks" would advance the purpose of the program access rules, and because Congress consistently used the term in this common, everyday sense, the only reasonable and non-arbitrary way to define an MVPD is simply to require that the particular distributor "makes available for purchase, by subscribers or customers, multiple video programming networks."

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[160] *See Effective Competition FNPRM*, 6 FCC Rcd at 210 (noting that some commenters "support[ed] a revised effective competition standard based on the availability of an independently owned and operated competing multichannel video programming service that offers consumers comparable programming at a price comparable to that of the incumbent cable company," and that other commenters "recommend[ed] that the competing system be required to provide a minimum number of channels and the same broad categories of programming service as the existing cable system at a comparable price."); *Effective Competition Order*, 6 FCC Rcd at 4551, n. 42 ("DOJ encourages some measurement of the actual substitutability of channel packages since local programs, news, and network entertainment are offered only over local broadcast stations, which are not carried on some noncable multichannel systems.").

[161] *See Effective Competition Order*, 6 FCC Rcd at 4553 ("[T]he proposed array of competing services may offer channel packages that differ from those of the incumbent cable system, yet we believe that these alternatives should be considered substitutes for basic cable service since they provide a variety of programming services with many of the characteristics of local stations, such as news, sports, movies, entertainment series and so forth.").

[162] *See Dolan v. USPS*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.").

VI. CONGRESS USED THE TERM "CHANNELS OF VIDEO PROGRAMMING" TO MEAN "LINEAR PROGRAMMING NETWORKS"

As detailed above, Congress used the term "channels of video programming" to mean pre-scheduled, real-time, linear streams of video programming – *i.e.*, linear programming networks. Congress' repeated references to specific cable networks that offer this type of programming leave no room for alternative interpretations,[163] and these programming networks are exactly what the Commission concluded in 1990 and Congress concluded in 1992 are necessary to provide effective competition to monopoly cable operators. Properly defining "channels of video programming" in this way also will significantly limit the number of entities that currently qualify as MVPDs, and thus significantly limit the potential implications that extend beyond Sky Angel's program access proceeding.[164]

Sky Angel notes that the Commission's previous finding that video-on-demand "images" constitute "video programming" has no bearing on whether an entity that offers subscription programming only on an on-demand basis qualifies as an MVPD. "Video programming" is only one part of the MVPD definition. Specifically, to qualify as an MVPD, a service must provide "multiple channels of video programming," which Congress intended to mean multiple pre-scheduled, real-time, linear programming networks. Video-on-demand services, by definition, do not offer this type of service.

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[163] *See also Implementation of the Provisions of the Cable Communications Policy Act of 1984*, Report and Order, 50 FR 18637, 18640, 1985 WL 132696 (1985) ("[W]ith respect to the definition of video programming, we conclude that this definition is sufficiently expansive to include such video programming as that provided by ESPN, HBO, and other satellite-delivered cable network programming.").

[164] Sky Angel expresses no opinion as to whether the Commission should ultimately rely on its ancillary authority to interpret "channels of video programming" more broadly than the term was used by Congress in 1992. As noted, the Public Notice poses questions well beyond the scope of Sky Angel's service, and thus well beyond the scope of the program access dispute the Public Notice allegedly was designed to address. Sky Angel therefore has limited its comments to those issues actually relevant to the Bureau's resolution of its Complaint.

With respect to the necessary level of picture quality, as the Bureau notes, the Commission has concluded that streaming video qualifies as "video programming" because technological developments have allowed streaming video to be comparable in quality to programming provided by a broadcast television station.[165] Similarly, the Commission and the Department of Justice recently defined "video programming" as:

> [P]rogramming provided by, or generally considered comparable to programming provided by, a television broadcast station or cable network, regardless of the medium or method used for distribution…[166]

This precedent directly refutes Discovery's claim that the Commission has consistently held that video delivered via the Internet fails to qualify as "video programming," as well as its claim that any programming that is "streamed" cannot fit within the definition of "video programming." However, even without this precedent, "video programming," as used in the MVPD definition, could not be defined as excluding streaming video because, under that interpretation, even many cable operators would no longer be classified as MVPDs. As noted, in order to address capacity problems, cable systems are increasingly turning to Switched Digital Video, which "combines the bandwidth efficiency of compressed digital content with switching technology to enable content *to be streamed* to viewers only upon request."[167]

VII. SKY ANGEL CLEARLY "MAKES AVAILABLE" MULTIPLE CHANNELS OF VIDEO PROGRAMMING

No basis exists to find that a video programming distributor using in part broadband Internet connections must have any type of common ownership, affiliation, or other business arrangement with Internet service providers in order to "make available" multiple channels of

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[165] *See* Public Notice, n. 47.

[166] *Comcast Order*, 25 FCC Rcd at 4358 (emphasis added); Department of Justice, *U.S. v. Comcast Corp., et al.*, [Proposed] Final Judgment, Case 1:11-cv-00106, p. 7 (Jan. 18, 2011) (emphasis added).

[167] *13th Annual Report*, 24 FCC Rcd at 673-74 (emphasis added); *see id.* at 674 ("The availability of open, IP-based architecture has catalyzed the development of reliable, cost-effective, and scalable solutions to this inefficiency.").

video programming. As detailed above, and noted by the Bureau, "an entity need not own or operate the facilities that it uses to distribute video programming to subscribers in order to qualify as an MVPD."[168] Moreover, such a requirement would be contrary to Congress' pro-competition goals because it would, in effect, exclude new entrants in favor of incumbents. In fact, it would disproportionately favor cable operators – the focus of the program access rules – because 58% of Internet-connected homes receive their service through cable systems.[169] The logistics of such a requirement also would prohibit the entry of new competitors. Regardless, because Sky Angel's customers subscribe to broadband Internet services, a contractual arrangement already exists with those third-parties for access to their conduits, which are used to passively transport Sky Angel's programming from the headends in New York City and Palo Alto to customers' homes. Sky Angel subscribers pay for the right to use their broadband Internet connections as they see fit, so any requirement that Sky Angel or other video programming distributors also enter into agreements with Internet service providers would allow them to insist upon double payment for a single service.

In reality, Sky Angel inarguably "makes available" video programming as that term is used in the MVPD definition. The Commission has made clear that the critical factor in determining whether an entity makes video programming "available" is direct contact with consumers because Congress intended to promote competition among MVPDs at the retail level.[170] For instance, when there is more than one entity in the chain of distribution paths, the

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[168] *See* Public Notice, ¶ 9 (quoting *Section 302 Recon. Order*, 11 FCC Rcd at 20301). *See also AFL-CIO*, 777 F.2d at 759 ("[A]dministrative agencies are generally under an obligation to follow their own regulations, procedures and precedents.") (internal quotation marks omitted); *Alaska Prof. Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999) ("Once an agency gives its regulation an interpretation, it can only change the interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.").

[169] *See* John Horrigan, *Broadband Adoption and Use in America*, p. 14 (OBI Working Paper No. 1, 2010).

[170] *See World Satellite Network, Inc. v. Tele-Communications, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 13242, ¶ 25 (1999) ("[I]n adopting the program access provisions, we believe that Congress meant to promote

Commission applies the MVPD designation to the entity "directly selling programming and interacting with the public."[171] Sky Angel enters into contracts with programmers whereby it obtains the rights to distribute their programming in return for payments made on a per-subscriber basis, it distributes this programming to its customers for a fee, and it directly handles all customer service aspects of its business.[172] In other words, Sky Angel actively participates "in the selection and distribution of video programming."[173] Sky Angel therefore "makes available for purchase, by subscribers or customers, multiple channels of video programming."[174]

VIII. THE PUBLIC INTEREST REQUIRES THAT SKY ANGEL'S INNOVATIVE SERVICE BE CLASSIFIED AS AN MVPD ENTITLED TO THE PROTECTIONS OF THE PROGRAM ACCESS RULES

In this era of dramatically increasing access to, and use of, high-speed broadband connections, the public interest requires that an innovative company such as Sky Angel, which is attempting to use broadband technology to distribute exclusively family-friendly programming at

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competition among MVPDs at the retail level so that subscribers or customers could receive the benefits of that competition through more programming choices at lower prices.").

[171] *Program Carriage NPRM*, 7 FCC Rcd at 8065; *see id.* ("[I]t would appear consistent with the objectives of the 1992 Act for the obligation [to obtain retransmission consent] to inure to the distributor in the chain that interacts directly with the public."); *Program Carriage Order*, 8 FCC Rcd at 2998 ("That responsibility [to obtain retransmission consent] should fall upon the entity choosing the programming and receiving the subscription fees for providing it.").

[172] *See Wizard Programming, Inc. v. Superstar/Netlink Group, L.L.C.*, Memorandum Opinion and Order, 12 FCC Rcd 22102, 22109-10 (1997) ("Wizard is neither an MVPD nor a buying agent of an MVPD. Wizard does not purchase or sell programming, and it does not make programming available for purchase by subscribers."); *id.* at 22111 ("The programming Wizard markets is acquired by SNG from programming vendors, and SNG assembles the various programming packages… [T]he new subscriber calls a telephone number that is answered by SNG operators. SNG employees close all sales of programming packages marketed by Wizard, initiate service to the customer, and handle billing and other customer service needs of subscribers that purchase Wizard-brand programming. Subscribers pay SNG, not Wizard, for programming marketed to them by Wizard. It is SNG, therefore, and not Wizard, that makes the programming available to subscribers.").

[173] *See Telephone Company-Cable Television Cross-Ownership Rules*, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 5069, ¶¶ 15-16 (1992) ("We believe that it is more consistent with Congressional intent to interpret the term 'transmission' as requiring active participation in the selection and distribution of video programming."); *NCTA v. FCC*, 33 F.3d 66, 71-72 (D.C. Cir. 1994) ("'[T]ransmitting' a video signal implies at least choosing the signal, or originating it, not necessarily conducting it personally to its destination. The telephone company is merely a conduit for those signals that originate with and are chosen by the caller or, in this case, the video programmer. The Congress that enacted the Cable Act was undoubtedly full of members to whom this is just as obvious as it is to is.").

[174] 47 U.S.C. §522(13) (emphasis added).

affordable rates, receives the benefits of the program access rules because, ultimately, it will be the American public that benefits. As the Commission has recognized, permitting new types of video programming distributors to obtain the program access protections "can provide the competitive benefits that Congress sought to achieve: market entry by new service providers, enhanced competition, streamlined regulation, investment in infrastructure and technology, diversity of programming choices and increased consumer choice."[175]

Although the program access rules apply only to vertically-integrated programmers, access to this type of programming is particularly important for competing distributors because "cable operators still own popular programming for which there are no close substitutes."[176] As a result, "such programming is necessary for viable competition in the video distribution market."[177] Clearly, even though Sky Angel has managed to secure the carriage of various other programming networks, Discovery's continued withholding of its programming has harmed Sky

[175] *Section 302 Order*, 11 FCC Rcd at 18227; *see* Department of Justice, *U.S., et al. v. Comcast Corp., et al.*, Complaint, Case 1:11-cv-00106, ¶ 39 (filed Jan. 18, 2011) ("*DOJ Complaint*") ("[S]uccessful exclusion … of video distribution rivals would likely harm competition by allowing Comcast to obtain or (to the extent it may already possess it) maintain market power."); *DOJ Competitive Impact Statement*, p. 27 ("Because Comcast would face less competition from other video programming distributors, it would be less constrained in its pricing decisions and have a reduced incentive to innovate. As a result, consumers likely would be forced to pay higher prices to obtain their video content or receive fewer benefits of innovation. They also would have fewer choices in the types of content and providers to which they would have access, and there would be lower levels of investment, less experimentation with new models of delivering content, and less diversity in the types and range of product offerings.").

[176] *2007 Program Access Order*, 22 FCC Rcd at 17816; *see 2002 Program Access Order*, 17 FCC Rcd at 12139 ("[A] considerable amount of vertically integrated programming in the marketplace today remains 'must have' programming to most MVPD subscribers… [G]iven the unique nature of cable programming, there frequently are not good substitutes available for vertically integrated programming services…"); *DIRECTV Transfer Order*, 23 FCC Rcd at 3300 ("Liberty Media and Discovery each control popular programming networks … without close substitutes.").

[177] *2007 Program Access Order*, 22 FCC Rcd at 17820; *see 2002 Program Access Order*, 17 FCC Rcd at 12139 ("[A]n MVPD's ability to provide a service that is competitive with the incumbent cable operator is significantly harmed if the MVPD is denied access to popular, vertically integrated programming for which no good substitute exists.").

Angel's ability to retain[178] and attract subscribers,[179] and thus become the viable competitive alternative Congress intended.[180]

For a new service like Sky Angel, these harms are exacerbated because "vertically integrated programming is essential for new entrants in the video marketplace to compete effectively."[181] Thus, if vertically-integrated programmers are permitted to withhold programming, "they can significantly impede the ability of new entrants to compete effectively in the marketplace"[182] and thereby provide the competitive benefits Congress sought to achieve. The Commission therefore must strive to protect emerging competitors from these anti-competitive practices, particularly because "vertically integrated programmers may have an even greater economic incentive to withhold programming from these recent entrants in the video marketplace. Because recent entrants have minimal subscriber bases … the costs that a cable-

[178] *See 2002 Program Access Order*, 17 FCC Rcd at 12139 ("We agree with the competitive MVPDs' assertion that if they were to be deprived of only some of this 'must have' programming, their ability to retain subscribers would be jeopardized."); *2007 Program Access Order*, 22 FCC Rcd at 17818 ("[S]ome nationally distributed networks are sufficiently valuable to viewers such that some viewers may switch to an alternative MVPD if the popular programming were not made available on their current MVPD."); *see DOJ Complaint*, ¶ 6 ("The public outcry when certain programming is unavailable, even temporarily, underscores the damage that can occur when a video distributor loses access to valuable programming.").

[179] *See 2002 Program Access Order*, 17 FCC Rcd at 12139 ("[E]ven if an acceptable substitute is found, the competitive MVPD is still harmed because its competitor can likely offer to subscribers both the unavailable programming and its substitute."); *2007 Program Access Order*, 22 FCC Rcd at 17819 ("[W]ithholding can have a significant impact on subscribership to rival MVPDs."); *id.* ("Such practices, in turn, predictably harm competition and diversity in the distribution of video programming, to the detriment of consumers."); *DOJ Complaint*, ¶ 5 ("Attractive content is vital to video programming distribution… Distributors compete for viewers by marketing the rich array of programming and other features available on their services.").

[180] *See 2007 Program Access Order*, 22 FCC Rcd at 17816 ("[V]ertically integrated programming, if denied to cable's competitors, would adversely affect competition in the video distribution market."); *id.* at 17817 ("[A]ccess to this non-substitutable programming is necessary for competition in the video distribution market to remain viable.").

[181] *Id.* at 17819 (emphasis added); *see 2002 Program Access Order*, 17 FCC Rcd at 12136 ("In enacting the program access provisions of the 1992 Cable Act, Congress indicated that it deemed vertically integrated programming to be vital to the success of new entrants…") (emphasis added).

[182] *2007 Program Access Order*, 22 FCC Rcd at 17820.

affiliated programmer would incur from withholding programming from recent entrants are negligible."[183]

Moreover, the emergence of competition from distributors such as Sky Angel is vitally important because "[e]ntry into traditional video programming distribution is expensive, and new entry is unlikely in most areas."[184] As a result, "Internet-based offerings are likely the best hope for additional video programming distribution competition."[185] For this reason, cable operators have an even stronger incentive to withhold affiliated programming from this particular type of emerging competitor.[186] The FCC therefore should not impose unreasonable and unintended restrictions on a new entity such as Sky Angel which requires the protections of the program access rules because doing so would limit competition without producing any discernible public interest benefits.[187]

On the other hand, expanded competition from innovative new services utilizing broadband Internet connections "has the potential to increase consumers' choice of video

[183] *Id.* at 17832-33.

[184] *DOJ Complaint*, ¶ 9; *see DOJ Competitive Impact Statement*, p. 28 ("Over the last decade, Comcast and other traditional video distributors benefited from an industry with limited competition and increasing prices, in part because successful entry into the traditional video programming distribution business is difficult and requires an enormous investment to create a distribution infrastructure such as building out wireline facilities or obtaining spectrum and launching satellites. Accordingly, additional entry into wireline or DBS distribution is not likely in the foreseeable future.").

[185] *DOJ Complaint*, ¶ 9.

[186] *See id.* at ¶ 54 ("Comcast has an incentive to encumber, through its control of the JV, the development of nascent distribution technologies and the business models that underlie them…"); *DOJ Competitive Impact Statement*, p. 19 ("Many internal documents reflect Comcast's assessment that OVDs are growing quickly and pose a competitive threat to traditional forms of video programming distribution."); *Comcast Order*, ¶ 85 ("[M]any of the other cable companies are similarly concerned about the OVD threat and [] NBCU feels pressure to avoid upsetting those companies with respect to any actions it might take regarding the online distribution of its content.").

[187] *See 2007 Program Access Order*, 22 FCC Rcd at 17842 ("Section 628 makes no distinction among MVPDs of the kind suggested by these commenters. Moreover, we find that adopting such restrictions on the entities that can benefit from the prohibition will limit competition in the video distribution market and will result in no discernible public interest benefits.").

providers, enhance the mix and availability of content, drive innovation, and lower prices."[188] Increased competition from these MVPDs also "will encourage broadband adoption, consistent with the goals of the Commission's National Broadband Plan."[189]

Promoting the entry and continued viability of additional competitors also benefits content providers. Increased demand from numerous distributors provides programmers greater negotiating leverage with respect to the terms and conditions of carriage. It also expands the reach of their content, and thereby increases overall license fees and advertising revenues.[190] In other words, every content provider should support a broad interpretation of "MVPD" in order to allow a service such as Sky Angel to become a viable competitor,[191] unless the programmer is influenced by the anti-competitive motives of an affiliated MVPD.[192] In short, Sky Angel is a perfect example of a video distributor which qualifies as an MVPD, with program access rights, and Discovery is a perfect example of a programmer acting contrary to its own economic interests in order to crush potential competition and thereby benefit an affiliated MVPD.

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[188] *Comcast Order*, FCC 11-4, ¶ 62.

[189] *Id.*

[190] *DOJ Competitive Impact Statement*, p. 23 ("A stand-alone programmer typically attempts to maximize the combined license fee and advertising revenues from its programming by making its content available in multiple ways.").

[191] In this respect, Sky Angel notes that a non-vertically-integrated programmer need not worry that it will become subject to the program access rules simply because it offers programming, even for a fee, on its own or an affiliated website. First, as noted, Sky Angel distributes programming in part through its subscribers' broadband Internet connections, not via a website, so a proper, particularized determination that Sky Angel qualifies as an MVPD would not affect the status of web-based distributors. Second, because Congress intended for "multiple channels of video programming" to mean "multiple pre-scheduled, real-time, linear streams of network programming," a service providing web-based on-demand programming would not qualify as an MVPD. Third, the program access requirements only apply to programmers vertically-integrated with cable operators, not generally with any MVPD (unless the Commission imposes such requirements in approving a merger).

[192] *See id.* at 23 ("Unlike a stand-alone programmer, Comcast's pricing and distribution decisions will take into account the impact of those decisions on the competitiveness of rival MVPDs. As a result, Comcast will have a strong incentive to disadvantage its competitors by denying them access to valuable programming or raising their licensing fees above what a stand-alone NBCU would have found it profitable to charge."); *id.* ("The JV would continue to value widespread distribution of NBCU content, but it also would likely consider how access to that content makes Comcast's MVPD rivals better competitors.").

If the Commission incorrectly determines that a service such as Sky Angel fails to qualify as an MVPD, not only will it decrease the broad pro-consumer benefits of the program access regime, it will strip itself of the authority necessary to adequately regulate various "traditional" MVPDs, including cable operators, that may use a broadband Internet connection as a link in their distribution chains.[193] In turn, this would undermine the Commission's recent efforts to "facilitate competition in the video distribution market" by eliminating other alleged loopholes to application of the program access rules.[194] In addition, forcing Congress to act each time a new distribution technology emerges simply is bad public policy that would deter investment in innovative technologies and impede competition. It was for this reason Congress enacted a broad MVPD definition and program access requirements. Otherwise, vertically-integrated programmers could permissibly discriminate against innovative competitors such as Sky Angel, whose particular service could not have been envisioned twenty years ago when Congress drafted the Cable Act.[195]

Finally, Sky Angel recognizes the practical limitations that may prevent the Commission from providing the full benefits of its program access rules to every new video programming distributor. For instance, the Commission may justifiably hesitate to apply the program access protections to the operator of a website that offers unencrypted video programming via a publicly

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[193] For instance, a cable system that offers Internet access to its cable subscribers may be able to sidestep various Commission rules designed to protect consumers that apply to programming on cable systems or even to MVPDs, but not as clearly to other types of video distributors. Assuming the system has the necessary copyright licenses and programming agreements, what had been deemed a cable system may choose instead to distribute its programming to a subscriber's home via the Internet or simply "re-classify" its last-mile connection as a broadband connection.

[194] *See Terrestrial Programming Order*, 25 FCC Rcd at 749-750. The Commission could lose its regulatory authority over the operations of such MVPDs as DISH, Comcast and Cablevision, which already offer distribution of live, linear channels over the Internet through various "TV Everywhere" offerings.

[195] *See* Edward J. Markey, *Cable Television Regulation: Promoting Competition in a Rapidly Changing World*, 46 Fed. Comm. L.J. 1, pp. 1-2 (1993-94) ("The convergence of the computer chip, the laser and fiber optics, digitization, and satellites are revolutionizing the telephone, cable, and broadcasting industries and driving our society towards a multimedia future that most of us can dimly imagine.") (emphasis added). Rep. Markey was the "Chairman of the House Subcommittee on Telecommunications and Finance and a principal author of the Cable Television Consumer Protection and Competition Act of 1992." *Id.* at 1.

accessible website. The extremely limited investment required for this type of service, as well as the lack of proprietary equipment and control by the distributor, could lead to unintended legal and regulatory consequences. This possibility must not, however, permit a vertically-integrated programmer such as Discovery to impermissibly withhold its programming from a service such as Sky Angel, which simply delivers encrypted programming across a broadband Internet connection as one component of its distribution system. Sky Angel's system requires an extensive amount of hardware and technology to capture, prepare, and distribute multiple linear programming networks to its subscribers. In addition, in order to receive the service, a proprietary set-top box must be connected to each television set intended to receive Sky Angel's service. This system is in stark contrast to a web-based video provider, which simply needs to access a server and create a publicly available website. Accordingly, a particularized finding that Sky Angel is an MVPD for purposes of the program access rules would only permit a limited number of additional entities to claim similar rights while still advancing Congress' goal of increased competition.

IX. CONCLUSION

Based on the foregoing, the Commission cannot reasonably, or legally, determine that Sky Angel fails to qualify as an MVPD entitled to the pro-consumer, pro-competition protections of the program access rules. Thus, because Discovery's withholding of programming from Sky Angel's subscribers and potential subscribers is clearly a discriminatory act in violation of the program access rules, the Commission should promptly find in favor of Sky Angel and grant all relief requested in its Complaint.

Respectfully submitted,

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